

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:)

Implementation of Section 207 of)
the Satellite Home Viewer Extension)
and Reauthorization Act of 2004)

MB Docket No. 05-89

Reciprocal Bargaining Obligations)



COMMENTS

Matthew M. Polka
President and CEO
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Nicole E. Paolini
Christopher C. Cinnamon
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, Illinois 60601
(312) 372-3930
Attorneys for the American Cable
Association

April 25, 2005

I. Introduction and Summary

In these Comments, ACA addresses the following issues raised in the Commission's Notice of Proposed Rulemaking in this docket: ("Notice") (i) whether the same good faith negotiation standard applies to broadcasters and MVPDs regardless of the DMA in which they reside; and (ii) the impact of the proposed reciprocal good faith negotiation rules on small and medium-sized cable companies, including how the Commission can tailor its rules to minimize the rules' impact on these companies. ACA also explains why the Commission should clarify that it is not a violation of the good faith negotiation requirement for a cable operator to decline to carry multicast programming. ACA's Comments show that:

- The good faith negotiation requirement in 47 USC § 325 applies equally to all broadcasters, both in-market and out-of-market.
- The Commission should establish procedural protections to prevent broadcasters from abusing the retransmission consent complaint process against small and medium-sized cable companies.
- The Commission should clarify that it is not a violation of the good faith negotiation requirement for a cable operator to decline to carry programming streams other than primary video.

About ACA. ACA represents nearly 1,100 independent cable companies that serve more than 8 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states and in virtually every congressional district. The companies range from family-run cable businesses serving a single town to multiple system operators that focus on serving smaller markets. More than half of ACA's members serve fewer than 1,000 subscribers. All ACA members

face the challenges of upgrading and operating broadband networks in lower-density markets.

II. The good faith negotiation requirement in 47 USC § 325 applies equally to all broadcasters, both in-market and out-of-market.

The NPRM asks whether the same good faith negotiation standard applies to broadcasters and MVPDs regardless of the DMA in which they reside. The same standard does apply. Section 325(b) makes no distinction between in-market and out-of-market broadcasters.

In enacting Section 325(b), Congress intended to create a “marketplace” for retransmission consent: “It is the Committee’s intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals. . .”¹ As this statement and the statute make clear, Congress did not limit the scope of retransmission consent to in-market negotiations. The express language of Section 325(b) applies to all commercial broadcast stations – local and distant alike.² Neither Section 325(b) nor the Commission’s regulations make any distinction between carriage of local and distant stations. Where Congress has made such a distinction, it is in the plain language of the statute.³

Accordingly, the Media Bureau has reached the conclusion that the requirement applies to both in-market and out-of market-stations, stating: “[W]e caution broadcasters to be aware of existing contractual obligations that affect a television

¹ Senate Committee on Commerce, Science, and Transportation, S.Rep. No. 92, 102d Cong., 1st Sess. (1991) at 36.

² 47 U.S.C. § 325(b) (2004) *amended by* PL 108-447 § 201, 118 Stat 2809, December 8, 2004.

³ *See, e.g.*, 17 U.S.C. § 111 (cable compulsory copyright license); 17 U.S.C. § 119 (DBS compulsory copyright license).

station's ability to negotiate retransmission consent in good faith. The statute appears to apply equally to stations and MVPDs in the same local market or in different markets."⁴

Despite the Media Bureau's warning and the clear language of Section 325(b), media conglomerates and affiliate groups routinely refuse to negotiate retransmission consent for out-of-market signals. This is particularly problematic for ACA members, many of which serve rural communities on the edges of DMAs in which out-of-market signals from the adjoining DMA are considered "local" by subscribers.

In its Order in this docket, the Commission should clarify that Section 325(b) requires that both in- and out-of-market broadcasters negotiate in good faith for retransmission consent. This clarification will create a more robust marketplace for broadcast signals, and more choice for consumers.

III. The Commission should establish procedural protections to prevent broadcasters from abusing the retransmission consent complaint process against small and medium-sized cable companies.

In the RFA attached to the Notice, the Commission asks for information on the impact of the proposed reciprocal good faith negotiation rules on small entities, and how the Commission can tailor its rules to minimize the rules' impact on these companies.

The proposed rule will increase media conglomerates' and affiliate groups' power in the retransmission consent process by giving them another weapon to deploy against

⁴ *Monroe, Georgia Water Light and Gas Commission d/b/a Monroe Utilities Network v. Morris Network, Inc., Owner of WMGT, Channel 41, Macon, Georgia, et al.*, CSR Nos. 6237-C and 6254-C, *Memorandum Opinion and Order*, 2004 WL 1661042 (rel. July 27, 2004), note 24 (emphasis added).

small and medium-sized cable companies to pressure them to carry programming they would not otherwise accept: a complaint for failure to negotiate in good faith.

The Commission has recognized the imbalance of power in retransmission consent negotiations between media conglomerates and small and medium-sized cable companies.⁵ The Commission has further noted that these small and medium-sized companies often lack the resources to finance retransmission consent disputes.⁶

ACA therefore recommends that the Commission enact procedural protections for small and medium-sized cable operators against broadcaster complaints for failure to negotiate in good faith, including:

- 30 days' written notice to the cable operator of the broadcaster's intent to file a complaint.
- An extended, 30-day period in which to respond to the complaint.

These protections are solely procedural. The substantive good faith requirement would be the same for MVPDs of all sizes. There is ample Commission precedent for such procedural protections for cable operators.⁷

IV. The Commission should clarify that it is not a violation of the good faith negotiation requirements for a cable operator to decline to carry multicast programming.

⁵ *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, *Memorandum Opinion and Order*, 19 FCC Rcd. 473 (2004) ("*News/Hughes Order*") at ¶ 176 ("...small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for 'must have' programming....").

⁶ *News/Hughes Order* at ¶¶ 176 and 224.

⁷ *Id.* at ¶¶ 176; 223-224; 47 CFR § 76.975. The procedural protections should not be limited to just those cable companies that serve 400,000 or fewer subscribers (which has been previously defined as a threshold by the Commission), but should extend to all medium-sized, non-vertically integrated cable companies, which also face a significant disadvantage when negotiating with media conglomerates and large affiliate groups.

ACA members already face broadcaster demands that they carry multicast programming as a condition for retransmission consent for the primary video signal. The reciprocal good faith negotiation requirement, however, will allow powerful broadcasters to pressure small and medium-sized cable companies to carry multicast programming that they would not otherwise accept.

The problem is this: broadcasters routinely require small and medium-sized cable operators to carry unspecified digital multicast programming as a condition of granting retransmission consent for the primary analog or digital programming stream. These companies face the threat that a broadcaster will file a retransmission consent complaint if the operator declines to carry multicast programming because of lack of capacity, or because the broadcaster has provided no assurances as to the content of the programming.

ACA therefore requests that the Commission clarify that, where the MVPD is negotiating for retransmission consent with a broadcaster, it is not a violation of the good faith negotiation requirement for an MVPD to decline to carry multicast programming.

The Commission has already found that the must-carry rules do not require carriage of other than the primary video stream.⁸ The rationale behind the Commission's *2005 Multicast Order* applies equally in the retransmission consent

⁸ *In the Matter of: Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules, Second Report and Order and First Order on Reconsideration*, CS 98-120 (2005) at ¶ 41 ("2005 Multicast Order").

context – multicast programming does not further any of the policy goals related to widespread carriage of broadcast signals.⁹

V. Conclusion

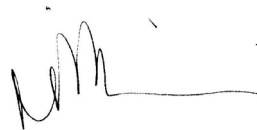
For the reasons detailed above, ACA requests that the Commission:

- Clarify that the good faith negotiation requirement in 47 USC § 325 applies equally to all broadcasters, both in-market and out-of-market.
- Provide additional procedural protections for small and medium-sized cable companies faced with a broadcaster complaint for failure to negotiate in good faith.
- Clarify that, where an MVPD is negotiating with a broadcaster for retransmission consent, it is not a violation of the good faith negotiation requirement for the MVPD to decline to carry programming streams other than primary video.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

By:



Matthew M. Polka
President and CEO
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Nicole E. Paolini
Christopher C. Cinnamon
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, Illinois 60601
(312) 372-3930
Attorneys for the American Cable
Association

April 25, 2005

⁹ *Id.* at ¶¶ 37-41.